No. 75-1606

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1976

WILLOUGHBY E. LACY. III,
Petitioner,

v.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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May 3, 1976

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COMES NOW. the petitioner, Willoughby E. Lacy, III, with a firm belief in Jesus Christ, the Holy Scriptures. the Constitution of the United States of America, and that justice will triumph, acting attorney pro se, and prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the Fifth Circuit entered in the above-entitled case on January 20,

1976 and denial of Petition for Rehearing En Banc entered April 5, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, as yet unreported, is printed in Appendix A hereto, infra, page 1. The Judgment of the United States District Court, Northern District of Alabama is printed in Appendix A hereto, infra, page 2.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit (Appendix A, infra, page 1 was entered on January 20, 1976 A timely petition for rehearing was denied on April 5, 1976 (Appendix A, infra, page 4). The jurisdiction of the court is invoked under 28 U.S.C. 88 1254 (1), Rule 19(1)(b) U.S. S. Ct.

QUESTIONS PRESENTED

1. Whether the appeal court erred in denying Motion to Strike Counsel of Record and Motion to Strike Appellant Brief, when a

showing was made that counsel was fraudulent, negligent, incompetent, and uncommunicative.

2. Whether the appeal court erred in denying Petition for Rehearing and suggestion for Rehearing En Banc.

3, Whether the appeal court erred in affirming the conviction when the civil standard was used for the word "Willful" in charging the jury in a criminal case.

(A) Whether the appeal court erred in affirming conviction when the term 'Willful" in Original and Supplemental Charges to the Jury amount to Instructions for a Directed Verdict in a Criminal Case.

(B) Whether the appeal court erred in affirming the conviction, when the trial court excluded motive, intent, and purpose as the Defense Bases.

4. Whether appeal court erred in affirming conviction when trial court did not permit Petitioner to demonstrate he was a victim of

selective and discriminatory prosecution.

5. Whether appeal court erred in affirming conviction when trial court committed prejudicial error by excluding testimony as to motive, intent, and purpose for not filing was in order for Petitioner to gain standing before the court for redress.

STATUTES INVOLVED

Title 26. U.S.C., Section 7203:

"Willful failure to file return, supply information or pay tax. Any person. .who willfully fails to make such return. . shall be guilty of a misdemeanor. ."

Title 26, U.S.C., Section 6012:

"(a.) General rule -- Returns with respect to income taxes under subtitle A shall be made by the following: 1. Every individual having for the taxable year a gross income of $600 or more.. 2. Every corporation subject to taxation under subtitle A;

(3) Every estate the gross income of which for the taxable year is $600 or more.

(4) Every trust having for the taxable year any taxable income, or having gross income of $600 or over, regardless of the amount of taxable income. . ."

(b.) Returns made by fiduciaries . . .

(1) Returns of decedents -- If an individual is deceased, the return of such individual required under subsection (A) shall be made by his executor, administrator or other person charged with the property of such decedent.

(2) Persons under a disability -- If an individual is unable to make a return required under subsection (A) . . the return of such individual shall be made by a duly authorized agent, his committee, guardian, fiduciary or other person charged with the care of the person or property of such individual."

Title 26. U.S.C., Section 6011 (a):

"(a.) General rule -- When required by regulations prescribed by the Secretary or his delegate any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make a return or statement shall include therein the information required by such forms or regulations."

Constitution of the United States, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment V:

. . . .nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and

district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

STATEMENT

On February 21, 1975, a Federal Grand Jury in the Northern District of Alabama indicted Appellant, Dr. Willoughby E. Lacy, III, on three misdemeanor counts of willful failure to file income tax returns for the years 1969, 1970, and 1971.

On March 6, 1975, Appellant, accompanied by Counsel, appeared for arraignment and entered a plea of not guilty.

Counsel had met Appellant in Birmingham on March 6, 1975 for arraignment, and Counsel departed for Texas immediately thereafter allowing no time to confer with Defendant

about the background of the case. Appellant did not see or confer with Counsel until April 9, 1975 when he again met him in Birmingham. At that time. Counsel and Appellant had been misled into believing that their appearance in Birmingham on April 9, 1975 was for Pre-trial Conference and Motion hearing. Since they had not discussed the case, neither was prepared for trial. Counsel had filed a Motion for continuance on April 8, 1975 to permit time for Pre-trial Conference and Motion hearings. The Motion was over-ruled. (R.T. 71-93) see infra P. 5-27. The abbreviation "R.T." refers to Reporter's Transcript. Counsel was reluctant to go to trial because insufficient notice had left him unprepared. During the nearly two days he was resisting being forced into trial unprepared, Counsel was informed by Judge McFadden, at one point, that he could withdraw and go back to Texas, but that the doctor (Appellant) was going to be forced to

trial with or without counsel of his choice. (R.T. [redacted]) see infra P. 10.

A jury trial was commenced which resulted in a verdict of guilty to all Three Counts. A sentence was imposed on the First Count of nine months imprisonment and $5,000 fine. Sentence was suspended on Counts Two and Three subject to the conditions of probation and subject to the condition that Appellant file tax returns for the years involved. Judge Pointer made no special condition regarding the payment of taxes; he added the condition that should Appellant fail or refuse to file returns for the years involved, then probation on Counts Two and Three could be revoked and there would be available for sentence two more years of imprisonment and $20,000 additional fine. (R.T. 400 & 401) see infra P. 2-3. Appellant contracted with Counsel to continue on appeal. On Monday, January 26, 1976, Appellant received from Counsel a copy of

notice of transference of his Appeal to Summary calendar issued from the Appeal Court (5th Cir.) on January 12, 1976. Counsel forwarded the notice without comment or cover letter to explain its significance or his delay in informing Appellant about a matter of such urgent importance.

Upon inquiry as to the import of this Summary Calendar, Appellant sent Counsel, Jim Tatum, a letter Dismissing him. (see P. infra 28).

In connection with the Summary Calendar notice, items from Counsel's January 6, 1976 statement aroused suspicions prompting Appellant's wife to call the Clerk's Office of the Fifth Circuit Court of Appeals the following day, Tuesday, January 27, 1976, for clarification.

The items on Mr. Tatum's statement that Appellant specifically questioned as out-of-pocket expenditures were: (See P. infra 29).

(a) Payment to Scofield Printing on July 29, 1975, in the sum of $716.10 for printing costs in Appellant's Case No. 75.2928;

(b) Payment for Plane tickets on November 18. 1975, in the sum of $143.73 for transportation to New Orleans for oral argumentation in Appellant's case.

The question about Plane tickets on November 18, 1975 was resolved by phone call to the Clerk's Office on January 27, 1975. Nothing pertaining to Appellant's Case had occurred on November 18, 1975 at the Fifth Circuit Court of Appeals.

Phone conversations with both Scofield Printing and Scofield Quality elicited that neither had performed printing services in Appellant's Case No. 75-2928, neither house had billed Mr. Tatum for $716.10 or any other amount in this case.

A call to the A.B. Letter Service verified that they had billed Mr. Tatum in the sum of

$57.98, but only for preparing the Appendix that Counsel had submitted in Appellant's Case No. 75-2928. A. B. Letter Service's bill to Counsel was still outstanding; it has since been paid by Appellant.

During her first phone conversation with Clerk's Office on January 27, 1976, Appellant's wife was informed that the Circuit Court had made Summary Decision on January 20, 1976 and to keep his Cause alive, Appellant would have to file a written request for a Time Extension to file a Petition for Re-Hearing within the remaining seven (7) days. Counsel had failed to send Appellant copies of the briefs in his case; the Clerk's Office agreed to forward copies.

With nothing to go on until he received copies of Appellant and Appellee briefs, except Counsel's malpractice of his responsibility to maintain continuing Attorney/Client dialogues, Appellant wrote for an extension of time to

file a Petition for Rehearing based on such grievances. On February 2, 1976, Appellant sent such request to the Clerk's Office by Mail.

On the same day Counsel apparently felt constrained to answer Appellant's letter of dismissal by writing Appellant a short but revealing letter, which follows:

"Doc

I am in receipt of your letter of January 26, 1976 advising me that I am fired. Please have your lawyer contact me regarding this case as you only have a short time to protect your rights. Also please advise when the balance of the account will be paid."

Upon examining the briefs in his Case which Appellant received from Clerk's Office the reasons behind Counsel's chronic 'too little - too late' perfor mances confirmed appellant's suspicions. It was obvious that Counsel had used the facilities of his own Office for duplicating the Appellant brief and was

attempting to defraud Appellant of money under the pretext of out-of-pocket travel and duplication expenditures.

The perfunctory character of the Appellant brief reflects Counsel's disdain for the object of Appeal which is an opportunity to raise pertinent issues and questions not properly dealy with in the court below. And by permitting the Appeal court to consider such issues and questions hereby safeguard Constitutional Rights, Liberties, and Immunities. Counsel's slipshot presentation is so far off target Appellant believes Counsel was anxious to rid himself of Appellant's problems by any means, regardless of how the outcome affected Appellant.

Counsel's quick study habits, faulty memory and tendency to take unwarrented liberties with the truth are best demonstrated by his ineffectual Appellant brief and Appendix. They show Counsel's failure to make a diligent

study of the trial transcript and select for Appellate challenge errors which would have put Appellant's position and situation into perspective for the Jury, had the court below given Appellant a fair and impartial trial. Among other things, Counsel displayed his negligence and incompetence in the following ways for which civil suit against him has been filed for Damages:

(a) Failure to prepare for trial by entering timely motions,

(b) Failure to advise Appellant to be present in the United States District Court on April 7, 1975, for Pre-trial proceedings, even though Counsel did not expect to be there (RA13) See P.A17. "RA" stands for Record Appendix.

(c) Misrepresenting Appellant's intent by infering that Appellant had entertained the idea of entering a Guilty Plea. (RA 14) See P.A18.

(d) Failure to emphasize the connection

between Appellant's placing a full page advertisement in the Wetumpka (Ala.) Herald criticising Internal Revenue practices and policies on January 23, 1975 and his Indictment on Income Tax charges on February 21, 1975, twenty-nine (29) days later. (T 271) See P. A 30 .

(e) Failure to raise and expand in Appellant brief on the error by the Court below in disallowing the Jury to consider material evidence offered as Defense Exhibit 2. being a copy of Internal Revenue Manual Supplement 95G-50 which explains to Internal Revenue Spies how to use Income Tax charges to suppress Protest and Dissent by selective prosecution of individuals it designates as 'Tax Protesters' (Tax Protestants) because they are more vocal than others in their exercise of First Amendment Religio/Political Freedoms (T 289 et seq.) See P. A31 Internal Revenue Manual Supplement 95G-50 See P. A32-37.

(f) And, by such omission, failing to

give himself occasion to point out in Appellant's brief that Internal Revenue's domestic espionage activities against Protesters and Dissenters including 'Tax Protesters' (Tax Protestants) were the subject of an 18 month investigation by the Senate Sub-Committee on Constitutional Rights which published their findings in a highly documented Report in December 1974 entitled POLITICAL INTELLIGENCE IN THE INTERNAL REVENUE SERVICE: THE SPECIAL SERVICE STAFF. And that the Subcommittee's findings stated, in effect, that Internal Revenue's espionage programs were attempts to promote Religio/ Political Orthodoxy by violating the Individual's First Amendment Freedoms and were operating without even a shred of statutory line authority.

(g) Counsel's tendency, to misrepresent Petitioner's intents, motives and posture (T328 & 329) See P. A38-39 and his need to rely on Petitioner to job his memory that Petitioner's

intents, motives and defense posture were and are based entirely on First Amendment Freedoms. (T 330) See P.A40.

(h) Counsel's failure to submit written instructions to enable the judge to properly charge the Jury.

(i) Counsel's failure to defend Petitioner's interests by raising questions in Appellant brief about errors prejudicial to Petitioner's intent, motives and postion which the Trial judge made in his Charge to the Jury. The Court below erred by leading the Jury to believe Petitioner had demonstrated evil intent and purpose in seeking to redress grievances by disobeying income tax statutes Petitioner considers unconstitutional. The Court below committed prejudicial error against Petitioner by telling the Jury that the manner by which one exercises his First Amendment Right to Redress grievances is by public debate, letters to the editor, or presentations to congressmen,

etc., not by disobeying what one regards as unconstitutional legislative enactments. (T 376, et seq.) See P.A41. Redress of grievances cannot be obtained by public debate, letters to the editor or EVEN by petitioning Congressmen or Senators. The business of Congress is to enact legislation NOT TO REDRESS GRIEVANCES. The business of the Courts and Judiciary is to Redress Grievances where the constitutionality of legislative acts is supposed to be tested. Until Petitioner disobeyed the income tax filing statute he had no standing before the Court to test its constitutionality. Had Petitioner filed Income tax returns and thereafter sought to redress his grievances by petitioning the Court for Summary judgment on the constitutionality of the filing statute, his Cause would have been dismissed on the grounds that Petitioner lacked standing. 'Volenti non fit injuria'.

(j) Counsel failed to ask the appeal court for Evidentiary Hearing on the issue of discriminatory prosecution. Petitioner is a victim of impermissible discriminatory prosecution. Recent evidence was turned up in a Case involving a Mobile, Alabama resident, who is a close friend of Petitioner and is the local Minister of a religious denomination called Ministry of Christ Church but is often refferred to simply as IDENTITY. Petitioner has frequently attended meetings of the Identity group at his friends home in Mobile. On one occasion in the early 1970's, FBI agents, who had been outside taking down Automobile License plate numbers during the Church meeting, followed Petitioner part way as he returned to his home in Wetumpka. Tthe new evidence is a letter from the Office Of Regional Counsel for Internal Revenue's Southeast Region and its subect is "Identity Group - Mobile, Alabama". It was received by the Chief of Intelligence in Birmingham on August 14, 1974. Since it speaks of package investigations

and explains how they are set up for prosecution, Petitioner was also a victim of impermissible discriminatory prosecution because of his religious beliefs. (A copy of the letter received by the Chief of Intelligence in Birmingham, Alabama on August 14, 1974) See infra P. A42.

REASONS FOR GRANTING THIS WRIT

1. Petitioner was and is being deprived of his Fifth Amendment privilege against being compelled to witness against himself. Petitioner claimed his privilege by asking the government to grant immunity which has, to this day, been ignored; as a result Petitioner has exercised his privilege by refusing to "witness" against himself on a tax form until such immunity is granted. This privilege has been ignored by the appeal court as well as the trial court. In Roy D. Garner v. United States No 74-100 U.S. S. ct. March 23, 1976 the discussion of this right is made:

"Held: Petitioner's privilege against compulsory self-incrimination was not violated. Since petitioner made incriminating disclosures on his tax returns instead of claiming the privilege, as he had the right to do, . ."

Justice Powell:

"The question is whether the introduction of this evidence, over the petitioner's Fifth Amendment objection, violated the privilege against compulsory self-incrimination when petitioner made the incriminating disclosures on his returns instead of then claiming the privilege."

The court discusses United States v. Sullivan, 274 U.S. 259

"If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any

return at all."

Had Garner invoked the privilege against compulsory self-incrimination on his returns in lieu of supplying the information used against him, the Internal Revenue Service could have sought to have Garner criminally prosecuted under §§ 7203 . . which provides for willful failure to make a return (see infra P. 4).

From Special Agent Carr B. Barefield's testimony on direct examination (R.T. 109-112) infra P. A43-46

Q. Did you have a conversation?

A. Yes, We had a conversation there.

Q. All right, sir.

A. He told me that he would give me access to his records, provided I would guarantee him immunity from prosecution. I replied that I had no authority to give him immunity from prosecution. But that if he wished to make that request in writing, I would forward it through channels.

Q. All right, sir. Was there any other conversation . . . ?

A. Not that day, no, sir;

Q. And did you have . . . .another conversation with Dr. Lacy?

A. Yes. On February 10th of '72. Six days later I called him again, and reminded him of his -- that he had promised to call me about his records. He said that he would like to meet with me and discuss the matter. I asked him then would he like to meet in my office or in his office. He said he preferred not to come to my office. And he would prefer that I not come to his office. And he suggested then that I meet him at the Wetumpka Cafe. I suggested that a cafe was not a good place to discuss confidential matters, but he insisted we meet there. And we did later in the day. We met at the Wetumpka Cafe, and had a conversation in his automobile in the parking lot there.

Q. All right, sir. Would you relate to the Court and jury that conversation?

A. Well, he again brought up the subject of immunity from prosecution. I again reiterated that I had no authority to grant such a request. I told him during the course of the conversation that if he would make his records avilable, that it would lessen considerably any civil or cirminal penalties that might be involved. That if he did not make his records avilable, we would necessarily have to recompute his income by contacting third parties. Later in the conversation he drew a paper from his pocket from which he read quotations from the Fifth Amendment and from the Fourth Amendment and from a federal law regarding invasion of privacy. . . ."

The paper which is mentioned above as being drawn from petitioner's pocket was a written Grant of Immunity form (see P.PAH7) which was given to Special Intelligence agent

Barefield and it was never heard from again.

The Court further in Garner states:

> "It is constitutionally sufficient, according to the court, that a valid claim of privilege is a defense in a 88 7203 prosecution."

We start with the fundamental proposition that -

> "A witness protected by the privilege may rightfully resuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent Criminal case in which he is a defendant." Kastigar v. United States, 406 U.S. 441 (1972).

Absent such protection, if he is nevertheless compellled to answer, his answers are inadmissible against him in a later criminal prosecution. Bram v. United States, (168 U.S. 532); Boyd v. United States, (116 U.S. 616)." Lefkowitz v.

Turley, 414 U.S. 70,78, (1973).

"In Marchetti, supra, at 48-49; Grosso, supra, at 66-67. Since submitting a claim of privilege in lieu of the returns also would incriminate, <u>the Court held that the privilege could be exercised by simply failing to file</u>."

> "In summary, we conclude that since Garner made disclosures instead of claiming the privilege on his tax returns, his disclosures were not compelled incriminations. He therefore was foreclosed from invoking the privilege when such information was later introduced as evidence against him in a criminal prosecution.
>
> The judgment is affirmed."

Further in Garner v. U.S.:

> "The information revealed in the preparation and filing of an income tax return is, for the purposes of Fifth Amendment analysis, the testimony of a "witness,"

"Marchetti and Grosso, of course, removed the threat of a criminal conviction when one validly claims the privilege by failing to file. ."

From the above the logical mind would have to conclude that one need no longer incriminate himself before the I.R.S.; and that the whole affair as has been conducted against the Petitioner by I.R.S., Prosecutors, Grand Juries, and the courts below does not conform to law.

2. Petitioner was not represented by competent Counsel, and thus was deprived of due process of law. At the time of trial Counsel told Petitioner that he (Counsel) was under investigation by the I.R.S. In addition to the above, Counsel was grossly negligent, incompetent, and fraudulent in the manner set out in the section of STATEMENT (of facts). Counsel did not give his entire devotion to Petitioner's motives and interests, did not maintain a warm zeal in defense of Petitioner's rights, and did not exert the utmost of his learning and defense skills and abilities in this case. Instead, Counsel sought to delay Petitioner for lucre while neglecting his duty and responsibilities to Petitioner in the manner condemned by Turner v. State of Maryland. 318 F2d 852, in which the Court said:

"Whether a lawyer is employed by a prosperous defendant at a handsome fee or serves an indigent without compensation in the

discharge of the duty resting upon him as an officer of the Court, the canons of our profession require his entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability."

On January 26, 1976 Counsel was dismissed and a motion was filed with the appeal Court to strike Counsel of Record. The motion was denied thus compounding Petitioner's difficulties. For instance, Petitioner's notices are still being sent to Counsel of Record. Without notice it is very difficult to go forward with an Appeal. In this matter the Appeal Court is further compounding Petitioner's difficulties.

"A client has an absolute and unconditional right to discharge his attorney at any time." DeKorwin v. First National Bank of Chicago, 155 F. Supp. 302.

3. Appeal court erred in affirming conviction because the court's use of the Civil standard for the word 'Willful' in charging the jury was erroneous and constitutes reversible error. The appeal court erred in affirming and the trial court's gratuitous explanation of the term 'Willful' in original and supplemental charge to the jury amounted to instructions for a directed verdict. It is axiomatic that a trial judge may not direct a verdict of builty in a criminal jury case. (United States v. Garaway, 425 F. 2d 185,) In instructing the jury on the elements necessary for conviction under provisions of 26 U.S.C. 7203, i.e., Willful Failure to File a Return, the Court below charged the Jury in accordance to the Civil Definition of the term "Willful'.

"Willful in this context means that such a failure to file must have been deliberate, intentional and voluntary and not the result of some accident or innocent mistake

or mere negligence. The law in this respect says that before someone can be guilty of a criminal offense for failing to file a timely tax return in the manner required, it must have been a willful failure, saving anything short of that for something other than criminal prosecution, only that which involves allegations of willful failure. And it is up to the government in this case to prove this willfulness as I have described it beyong any reasonable doubt. Willfulness in this sense involves an intentional disregard or disobedience of some legal requirement . . .

"The question may be raised as to, well, what if a person failed to file a tax return, though required to do so, but he was doing so as a political protest or because he thought the income taxes were unconstitutional or for some other sincere reason, would that constitute an excuse: No.

"In the question of whether some failure to act is willful, you may look to the entirety of the circumstance. Sometimes it is difficult to prove or establish what a person's state of mind is.

"One has a right to petition his goverment for redress of what he considers to be grievances. But the form in which that is done involves matters of politics, public debate, letters to the editor or presenta tions to cangressmen and the like and constitutes no basis of excusing a clear requirement of the law insofar as payment of taxes or filing a return." (R.T. 375-377)

In Supplement Charge the trial Court re-stated the Civil Standard for "willful" and instructed the Jury to specifically disregard intent and motive as an element for conviction on Criminal charges.

"The term willful as used in this statute means a voluntary, purposeful, deliberate and intentional failure to file a return as distinguished from, for example, an accidental failure, inadvertent failure, or even a negligent failure for some reason to file a return.

"notwithstanding whether it is a good intent or bad intent, if it is a knowing disregard of a requirement of law and is done deliberately and intentionally, then it is a willful action or in this case in the context of this case a willful failure. The law in this regard, believing that, for example, a protest to a particular law does not give one an excuse to disobey it, but they must live with consequences of that, if they choose to do so."

Counsel for Petitioner made timely objections, out of the presence and hearing of the Jury, in each instance. After Original Charge,

Defense Counsel stated, inter alia, that

> "... willfully would be more properly submitted under the holding in United States v. Bishop, 93 Sup. Ct. 2008, which goes on to say that bad faith or ivil motive and want of justification ... that willfully means to act both of intentional and reprehensible qualities and to submit merely on the basis that it requires an act to which the only defense in unitentional acts, a non-purposeful, either negligence or unintended .... renders it impossible for this defendant to receive a fair trial in connection with the matter."

After the Supplemental Charge, Defence Counsel objected to the Trial Courts out-of-context definition of the term "willful".

In considering the effect of the district judge's statements to the Jury, which have been quoted above, this Court should consider that throughout the trial the judge had inflexibly refused

to permit the Defense to raise the issue of evil purpose or bad faith as the criterion of criminal 'willfulness'. By definition Civil 'willfulness' is distinguished from Criminal 'willfulness' on the sole basis of motive. Bouvier's Law Dictionary makes the distinction:

> "It implies that the act is done knowingly and of stubborn purpose, but not with malice; State v. Swain, 97 N.C. 465, 2 S.E. 68; and in penal statutes, it means with evil intent, or with legal malice; Galvin v. Mill Co., 98 Cal. 268, 33 Pac. 93; or with a bad purpose; Com. v. Kneeland, 20 Pick, (Mass.) 2220, quoted in Potter v. U.S., 155 U.S. 446, 15 Sup. Ct. 144, 39 L. Ed. 214. It is frequently understood as signifying an evil intent without justifiable excuse; 1 Bish. Cr. Law 428.

By excluding any references to or consideration of Petitioner's motives --the Court below tacitly led the Jury to conclude that Petitioner was a

miscreant impelled by dark and sinister motives. And by further excluding, both in and out of the Jury's presence, (R. T. 270 & 382-383) any application of the standards of criminal intent and motive set forth in United States v. Bishop 93 S. Ct. 2008 (1973) the trial Court presumed to overtly regulate and control the Defense. In Bishop the United States Supreme Court set square and symmetrical guidelines for determining "willfulness" in both tax felony and tax misdemeanor statutes on the motivational basis as traditionally applied in other criminal prosecutions.

> "(The) Word "willfully" has the same meaning in tax felony statutes as in tax misdemeanor statutes, importing with respect to both a bad purpose or evil motive: disapproving Abdul v. United States, 254 F. 2d 292.
>
> ". . ."willfully" generally connotes a voluntary, intentional violation of a known legal duty, and involves a bad purpose

or evil motive. "Requirement that a tax offense be committed "willfully" is not met if a taxpayer had replied in good faith on a prior decision of the Supreme Court."

In what appears to have been an attempt to ride on the momentum of previous (but dissimilar) Tax Protest cases in which unwitting Defendants had also been convicted on the Civil definition for the term "willful", the trial Court suggested that since both cases had been decided by the Fifth Circuit subsequent to the Bishop case, (which was decided on May 29, 1973), they were the controlling case law in this circuit, (R.T. 383-384) Supreme Court rulings, notwithstanding. The trial Court further compounded their errors by ignoring that the United States Supreme Court stated their reason for reviewing the Bishop case on page 2011;

"Since the meaning of "willfully", as used in the tax crime statutes has divided the circuits, we granted certiorari, 409 U.S.

841, 93 S. Ct. 64, 34 L. Ed. 2d 79 (1972)";

and in footnote 2, page 2011, pointed out that;

"Other inconsistencies in interpreting the word "wilfully" have compounded the confusion."

B. The Trial Court shifted the burden of proof onto the Petitioner. By preventing the Defense from relying on the criminal standards of "willfulness" set forth in United States v. Bishop, 93 S. Ct. 2008 and prior Supreme Court decisions, such as United States v. Murdock, 54 S. Ct. 389 (1933), which the High Court, itself, used as its precedent in Bishop, the court below shifted the Prosecution's burden of proof onto Petitioner. The Trial Court's hostile insistence on restricting the Defense to the Civil Standard of "willfulness" operated to stifly any showing of Petitioner's good intents and motives or the First Amendment grounds on which he based his failure to file in order to achieve standing before the court to redress his grievances.

The mechanics involved here are similar to those

which required the Defendant in United States v. Falk, 479 F. 2nd 616 (1973) at 621 to refuse induction into the Armed Forces and failure to possess a draft registration card, as a conscientious objector, in order to be in the position to assert a valid claim. Had instant Petitioner complied with statutory requirements to file returns he would have no standing for redressing his grievances.

By filing returns, which Petitioner regards as violative of his Freedoms as a Protestant because they follow the Religious Liturgy of Confession, would have been an act of consent and a forfeiture of his right to claim injury thereby.

The attitude of the judge throughout trial prevented the Defense from introducing explanations of Petitioner's understanding of the First Amendment as an Injunction that enjoins Civil servants from resorting to ecclesiastical law under color of secular practices to suppress Dissent and Protest amongst the tiny minority

of any generation bold enough to be non-conformists that they might redress grievances. Petitioner knows of no other valid way to uphold the Constitution and rejects the nonsensical suggestion of the trial court that redress of grievances is not a matter of the courts or judiciary, but is to be pursued by public debate letters to the editor, or writing members of Congress.

The Appeal court erred in affirming conviction and the trial court erred by not permitting Petitioner to show he was a victim of selective and discriminatory prosecution. The chronology of events preceding indictment suggests that Petitioner was a victim of Selective and Discriminatory Prosecution. Less than a month after Petitioner placed an Article, critical of the income tax scheme, as paid advertising, in the January 23, 1975 Wetumpka (Ala.) Herald, he was indicted for Willful Failure to File Returns. There are two ironic aspects to these seemingly connected events. The First is that it disproves

the Trial judge's bizarre theory about Newspapers being forums through which Redress of Grievances can be readily procured. And the Second is that the Article, itself was a description of the way Internal Revenue fails to enforce the provisions of 26 U.S.C. 6012 (supra) by failing to prosecute Career Fiduciaries under the Criminal statutes of Title 26. The layout of the full-page Advertisement included the pertinent provisions of 26 U.S.C. 6012 (the income tax filing statute) and pointed out that Internal Revenue practiced a policy of granting Indulgences to Banks and attorneys whose income is largely derived from Fiduciary activities.

It seems the trial Court was unaware that in December 1974, the Senate Subcommittee on Constitutional Rights published a highly documented Report entitled POLITICAL INTELLIGENCE IN THE INTERNAL REVENUE SERVICE: THE SPECIAL SERVICE STAFF. The Report was compiled, after an 18 month investigation of Internal Revenue's domestic

espionage programs, under direction of Senator Sam J. Ervin, Jr., the Subcommittee Chairman. The Subcommittee found that the activities of Internal Revenue's Special Service Staff, formed in 1969, were focused on a broad spectrum of Political Activists. Certain individuals and groups were "targeted" for the Secret Spy unit's attention and a total of 8,585 individual files and over 3,000 organizational dossiers were collected. Both individual and group files covered a wide range of backgrounds and religious and political persuasions. Included in the records developed by the Special Service Staff were persons identified as Tax resistors, Catholic, Protestant and Jewish Clergymen, Authors, Civil Rights Leaders, Actors, Actresses. Labor Organizers, Anti-war activists and draft-card burners. The common denominator emerged as the individual's public espousal of unpopular or dissident causes. The stated goal of the secret organization was to collect data and

intelligence for dissemination to Internal Revenue's compliance Division for later action by the Audit and Intelligence Divisions and thus to "provide a greater degree of assurance of maximum compliance with the Internal Revenue laws by those involved in extremist activities and those providing financial support to these activities." (Pages 14 and 144, Political Intelligence in the Internal Revenue Service.) Shortly before the secret unit was (ostensibly) disbanded officially in August 1973, a status report read:

> "Beginning in early 1972 the staff experience indicated that a definite trend had developed away from a focusing of attention on those dissident, activist and extremist groups of the late sixties and early seventies. The interest and primany thrust of the Staff was more clearly refocused upon groups and individuals actively urging noncompliance with the tax laws." (p. 14 Political Intelligence in the Internal Revenue Service.)

Senator Ervin roundly condemned the objectives of the Special Service Staff in his preface to the Political Intelligence in the Internal Revenue Service Report. He saw Internal Revenue's domestic Intelligence mission as covert assaults on, threats to and abuses of the Individual's First Amendment Freedoms of thought, speech, and expression:

> "The purpose of the Internal Revenue Service is to enforce the tax laws, not to enforce political orthodoxy.
>
> "Governments quickly forget that they are servants, not masters of the people.
>
> "They (the Special Service Staff) found over 10,000 "enemies", far more than the White House had listed, and far less than the hundreds of thousands the Army discovered.
>
> "Dangers to Liberty, we have been told, come from those in government, who are well-meaning but without understanding of the other price of liberty. That is the price we must pay in political and social unrest, in

hearing ideas we detest, expressed by people we abhor. But as long as those ideas are protected by the Constitutional liberties of free expression, they must be tolerated, not suppressed by IRS, the Arm, or any other government authority.

"It is soon enough to act when, if ever, those ideas are transformed into violence. To act earlier is to do far greater injury to the Constitution which all government officials are sworn to uphold."

Again it may be purely coincidence that shortly after Petitioner was defeated as a candidate for the State Senate in the Fall of 1970, he received his first visit from Special Agent Doyle L. Coats of Internal Revenue's Intelligence Division. (R?T? 95-96) The main plank in Petitioner's platform was abolition of the (State) Income Tax. He received substantial newspaper publicity and his message was broadcast over five (5) local radio stations.

This event seems to further contradict the trial judge's theory about using the media to redress grievances. Furthermore the efforts of Congressional Committees and respected Senators like Sam Ervin to correct wrongdoing by lengthy investigations and exhaustive Reports thereupon, denouncing Internal Revenue's Surveillance operations, do not seem to have redressed Petition's grievances, either. Instead, each time Petitioner expressed his views through the means and channels the Trial judge recommends for redressing grievances, he elicited responses from Secular servants that gave him the unpleasant sensation he was being 'chilled' for exercising First Amendment Freedoms.

Whether there is a connection between the foregoing and the urgency to prosecute and convict Petitioner just before the 1975 Income Tax Filing date, when Counsel was reluctant to go to trial because insufficient notice had left him unprepared, is still a matter of

speculation. (R.T. 71-93) Undue haste is as much a denial of Justice as undue delay. In the instant case it placed Petitioner at a severe disadvantage by preventing him from fully explaining to Counsel the suspicious chronology of events preceding indictment and prosecution. Under cross-examination, Revenue Agent Barefielf stated that after August 1973 he had no connection with Petitioner's case. "until I was called to Birmingham here to act as a witness on very short notice".

The mood in the Federal courthouse at Birmingham the second week of April 1975 seemed to be to disallow time for Pre-trial inquiry and investigation and to deny all Defense Motions for the sake of hustling Petitioner to trial at the earliest possible moment. Hence, Petitioner was unable to sufficiently acquaint Counsel with the background of his case to permit Counsel to enter a timely Motion for Evidentiary Hearing for denial by the Court below in accordance

to the prevailing mood. While Petitioner was being investigated for Criminal prosecution for vocally protesting against the Income Tax Scheme, Internal Revenue was proceeding civilly against Marguerite McGill, an Opa-Locka, Florida, resident who has since moved to Michigan, for doing exactly what Petitioner did for exactly the same years. Although Mrs. McGill has strong feelings about the Income Tax scheme, she has never publicly aired them in the press or electronic media. Nor has she identified with groups or religious associations that openly challenge the Income Tax program.

Furthermore time did not permit Petitioner to explain to Counsel that the reason Bankers and attorneys, who enrich themselves as career fiduciaries, are not inclined to vocally protest the Income Tax strategy, is because they enjoy the remission of temporal punishment Internal Revenue grants them by Plenary Indulgence.

Petitioner contends that every Freedom the First Amendment affords him by Injundtive relief from Church/State rule has been abridged in the course of investigating, indicting and prosecuting him for being a Tax Protester (Protestant). Petitioner further contends that the Fifth Amendment is likewise an Injunction which protects him against being subjected to the discriminatory practices of Inquisitorial Politics.

The Fifth Amendment, like the First, is designed to immunize American citizens against proponents of Religio/Political Orthodoxy making public scapegoats of those who express dissident or protestant view on the one hand while indulgently remitting the same 'Sins' when they are silently committed by a supposedly 'better class' of people, on the other.

The First and the Fifth Amendment Injunctions and the other Freedoms and Immunities enumerated in the Bill of Rights, directly or by injunction, were not invented in Philadelphia. They are the

well pondered safeguards against a repeat performance of the historical trampling of individual Freedom and Liberty that Church/State Rule generated in European countries. Accordingly, the Fifth Amendment guarantees to a defendant in a federal criminal prosecution the right to have the law applied against him in a non-discriminatory fashion. Bolling v. Sharpe, 347 U.S. 497 (1954); Washington v. United States, 130 U.S. App. D.C. 374, 401 F 2d 915 (1968.

The historical antecedent to this invocation of Fifth Amendment protection is found in Yick Wo v. Hopkins, 118 U.S. 356 (1886) where the Supreme Court first forbade government officials from applying the law "with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances."

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

Willoughby E. Lacy III

WILLOUGHBY E. LACY, III
Petitioner Pro Se
128 Company Street
Wetumpka, Alabama 36092

May 3, 1976

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CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the foregoing Petition for Writ of Certiorari was served on the Solicitor General, Department of Justice, Washington D.C. 20530, by placing the same in the United States Mail, postage prepaid, CERTIFIED FIRST CLASS MAIL/RETURN RECEIPT REQUESTED/ No. 20530, the 4th day of May, 1976.

Willoughby E. Lacy III

WILLOUGHBY E. LACY, III
Petitioner Pro Se
128 Company Street
Wetumpka, Alabama 36092

APPENDIX
No. 75- 1606

MAY 17 1976

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1976

WILLOUGHBY E. LACY III,
Petitioner,

V.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

WILLOUGHBY E. LACY, III
128 Company Street
Wetumpka, Alabama, 3609
Attorney Pro Se

May 3, 1976

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

DO NOT PUBLISH

NO. 75-2928
Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLOUGHBY E. LACY, III,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Alabama

(January 20, 1976)

BEFORE BROWN, Chief Judge, GODBOLD and GEE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.1/

*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409. Part I.

1/See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

2 — 3

United States of America vs.

United States District Court for

DEFENDANT: [redacted]

NORTHERN DISTRICT OF ALABAMA

DEFENDANT: WILLOUGHBY E. LACY, III — DOCKET NO.: CR 75-M-47 S

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH: April DAY: 14 YEAR: 1975

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Jim Tatum (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a ~~XXXXX~~ jury verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of wilfully and knowingly failing to file income tax return for the calendar year 1969 as required by law, Count 1; wilfully and knowingly failing to file income tax return for the calendar year 1970 as required by law, Count 2; wilfully and knowingly failing to file income tax return for the calendar year 1971 as required by law, Count 3;

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Nine (9) Months and fined Five Thousand ($5,000.00) Dollars, under Count 1; Execution of said sentence and fine to stand committed April 24, 1975 at 9 AM, at which time said defendant shall surrender himself to the United States marshal at Birmingham, Alabama.

SPECIAL CONDITIONS OF PROBATION

It is further ORDERED that imposition of sentence be, and it hereby is suspended, under Counts 2 and 3, and the defendant is placed on probation for the period of Two (2) Years, subject to the general terms and conditions of probation of record in this court, and subject to the special condition that defendant file income tax returns for the calendar years of 1969, 1970 and 1971; or until otherwise discharged as provided by law.

It is further ORDERED that the period of probation imposed in Counts 2 and 3 commence upon defendant's due and legal release from custody, under Count 1.

It is further ORDERED that defendant be taxed with costs and if same are not presently paid, execution may issue.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

A TRUE COPY
JAMES E. VANDEGRIFT, Clerk
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
BY: [signature] DEPUTY CLERK

SIGNED BY
[X] U.S. District Judge
[ ] U.S. Magistrate

[signature]
WILL C. POINTER, JR.

April 14, 1975 — 75-47

11

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
Clerk

OFFICE OF THE CLERK

April 5, 1976

600 CAMP STREET
NEW ORLEANS, LA. 70130
TELEPHONE 504 589-6514

TO ALL COUNSEL OF RECORD

No. 75-2928 - USA v. Willoughby E. Lacy, III

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

by [signature]
Deputy Clerk

/smg

cc: Mr. Jim Tatum
Mr. James Thomason, III

BEST COPY AVAILABLE

2 - 28

January 26, 1976

Mr. Jim Tatum

415 Caroline

Houston, Texas

Dear Mr. Tatum:

This is to notify you that you are fired. This action is made necessary by certain things which have most recently come to my attention.

Very truly,

W. B. Lacy, III

713/222 7331

24

Law Offices of
JIM TATUM AND ASSOCIATES
415 Caroline / Houston, Texas 77002

1/13/76 100.00
1/19/76 300.00

January 6, 1976

Dr. Willoughby Lacy, III
128 Company Street
Wetumpka, Alabama 36092

Dr. Lacy:

Hope you had a good Christmas. I am looking over your account and I see the following expense items.

7-22	Docket Fee on Appeal	50.00
7-22	Federal Court Reporting Co.	226.15
7-29	Scofield Printing	716.10
11-10	A.B. Letter Service	57.89
11-18	Plane Tickets (My Ck.#3267)	143.73
		$1,193.87
	Payment of 11-24-75	300.00
	Balance	$ 893.87

Will, I have handled an appeal for you which is worth several thousand dollars and I am shocked to see that I haven't even been paid my out-of-pocket, much less time, etc. Please forward your check for $893.87 by return mail or I will have no choice other than to file suit for the reasonable value of my services in

I read in the paper that Dr. Lacy had been indicted by the grand jury.

Q All right. And that was in March of 1975?

A I believe that is right.

Q All right. Had you heard anything of Dr. Lacy in the period immediately preceding his indictment?

A I heard nothing, no, sir.

Q Were you aware of the fact that he had run a full page ad in the Wetumpka Herald protesting income tax just prior to being indicted?

MR. THOMASON: Your Honor, I object. I fail to see any materiality to this.

THE COURT: What is the purpose?

MR. TATUM: Just to see if there was any knowledge on the part of the agent as to the connective time between Dr. Lacy being indicted and him receiving publicity as a tax protestor, Your Honor.

THE COURT: I sustain the objection. And the jury will disregard the assumption contained in the question.

MR. TATUM: Please note our exception.

Then after he was indicted, what was your next connection with the case, Mr. Barefield?

A I had no connection until I was called to

THE COURT: I sustain the objection.

Q Mr. Hartely, do you all proceed with these investigations of these people in accordance with manuals or directives issued from your headquarters of the Internal Revenue?

A Yes, sir.

Q And do you afford any different treatment or any emphasis on the so-called tax protestors than just other people who are delinquent in filing their 1040's?

MR. THOMASON: Your Honor, I object to this line of questioning.

THE COURT: I will sustain. But if counsel wishes to be heard at the bench why I ought not to sustain it, I will be happy to, if you want to come to the bench.

MR. TATUM: I will try to tie it together with one or two more questions. It may be perhaps it is totally inadmissible.

THE COURT: All right.

MR. TATUM: May we have this marked for identification at this time?

(Defendant's Exhibit 2 marked.)

Q Mr. Hartely, I'm going to show you what has been marked -- may I approach the witness, Your Honor?

manual supplement | 9SG-50

US Treasury Department Internal Revenue Service

August 14, 1973 Tax Protesters

We are concerned about the continuing publicity of taxpayers' admitted failures to comply with the federal tax laws as a means of protest. Our concern is because the publicity of seemingly successful tax violations, regardless of motive, causes erosion of public confidence in our tax system, with a resultant adverse impact on voluntary compliance.

Much of the "tax protest" publicity in recent years has focused on those protesting American military involvement in Southeast Asia and, in particular, their refusal to pay the nominal Federal excise tax on telephone service. However, with the winding down of the conflict, other types of tax protestors have gained attention. Among the most vocal are those refusing to comply with the tax laws on the grounds that our entire tax system is unconstitutional.

There are no reliable estimates of the aggregate number of people failing to comply with the tax laws as a means of protest. Indications are that the number is quite small, perhaps a few hundred. However, based on the 70,000 incidences in 1972 of refusal to pay the telephone excise tax, there may be a sizable number of people who would engage in serious tax violations as a means of protest if they could do so without concern for criminal penalties or serious jeopardy to their property.

Nationally, the Intelligence Division has taken or is taking action against many violators who achieved self-promoted prominence as tax protesters. We believe the publicity attending these enforcement actions has done much to deter others from embarking on similar courses of illegal action.

The Western Region in particular, a major pocket of tax resisters, continues to mount a concerted effort against the violators. However, there are indications that pockets may be forming in other parts of the country. Thus, we believe it is appropriate to set out some broad objectives and guidelines.

Our objective is to deter the widespread use of tax noncompliance as a means of protest. We believe a selective approach, rather than a large scale national project, is the most effective and efficient way to achieve this objective. Therefore, primary emphasis will be placed on the identification and investigation of cases in which prosecution will result in the maximum contribution to this objective. These cases will normally be those involving flagrant violations and those involving violations by individuals who have achieved notoriety as tax protesters. Such cases usually provide a vehicle for extensive news coverage which alerts a large segment of the taxpaying public to the consequences of noncompliance. The publicity aspects, of course, require a close working relationship with the public information officers.

It is neither our intention nor desire to suppress dissent or to persecute individuals because they are critical of, or are identified with groups critical of, the tax system or government policies. Our sole purpose is to further the total Service objective of encouraging and achieving the highest possible degree of voluntary compliance with the tax laws by enforcing statutory sanctions. Therefore, the existing criteria for evaluating information items and selecting cases for criminal investigation must be scrupulously observed, with special emphasis on the high impact cases mentioned above.

We need to be kept informed of significant trends and Service activities in the tax protest area. We believe this need can be adequately satisfied through the use of existing reports, as follows:

1. Effective with the quarter ending September 30, 1973, each ARC-Intelligence will include in the quarterly Regional Narrative Report of Intelligence Operations (IRM 9562), a brief narrative summary of tax protest trends; significant Intelligence actions; and problems and proposed solutions.

2. Sensitive case reports will be prepared and submitted, when appropriate, as provided in IRM 9551.

We have attached, for your information, summaries of several successful cases in the tax protest area. These include the more common violations, the techniques employed, and the sanctions used. We will build on this information from data to be furnished in the narrative reports, and disseminate it to the field.

John F. Hanlon
John F. Hanlon

Effect on Other Documents

This supplements IRM 9562, which should be annotated by pen and ink with a reference to this Supplement.

Attachment

Attachment 1 to MS 950-30

SUCCESSFUL PROSECUTIONS IN THE TAX PROTEST AREA

Filing of False Forms W-4

A. Mark T. Riley
Sacramento, California
94-21-058-21

On April 30, 1970, Riley, a college professor at Sacramento (California) State College, filed a Form W-4 with his employer claiming a total of 14 exemptions, the number he had previously determined would be sufficient to allow no withholding from his salary. Riley was entitled to only two exemptions.

Riley contended that his action was a demonstration to the government of his opposition to its policies in general, and its military policies in particular. Riley did not file an income tax return for 1970.

Riley was charged under IRC 7205 with one count of filing a false or fraudulent Employees Withholding Exemption Certificate (Form W-4). After pleading guilty, Riley was sentenced to one year confinement, six months to be served in jail and six months suspended; a $500 fine; and three years probation. A condition of the probation was that Riley pay all court costs incurred in the prosecution and the proceedings of the case.

B. Ronald C. Mitchell
Fresno, California
94-21-006-11

On May 10, 1972, Ronald C. Mitchell, a taxi cab driver and active member of the Fresno-based Tax Rebellion Committee, was convicted by a Federal jury of filing a false or fraudulent Form W-4.

When first notified of the investigation, Mitchell chose to invoke his Constitutional right to remain silent, thereby making the government establish its evidence through third party witnesses.

Mitchell was charged under IRC 7205. Mitchell claimed six exemptions when he was entitled to claim only one. The inflated Form W-4 which he filed was in effect with his employer for only 18 days. A calculation of tax lost to the government due to the claiming of five false exemptions amounted to about $5. After a discussion with the U. S. Attorney, it was decided that the lack of a significant tax liability would not hinder the case.

Mitchell, in representing himself, attempted to bring to issue the constitutionality of the tax system, but was refrained from doing so by the trial judge.

Before sentencing Mitchell to one year imprisonment, the trial judge pointed to the fact that Mitchell had not cooperated with the probation office.

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Attachment 1—Cont.(1) to MS 950-30

C. Numerous other false Form W-4 convictions have been obtained throughout the country under IRC 7205. The number of exemptions claimed range from a very few, by those trying not to arouse suspicion, to a significant number, by those attempting to call attention to their action. In many cases, the jurat at the bottom of the Form W-4 has been crossed off. In many instances, those individuals who are attempting to call attention to their action will provide a letter of explanation to their employer and/or the IRS.

The principal defenses raised by those charged have revolved primarily around the constitutionality of the tax system, and, for those who have notified the Service, the lack of willfulness of their action.

Sentences for those convicted have ranged from one year imprisonment to a few days probation. Some of the probations have been conditioned upon the individual complying with the laws administered by the IRS.

Failure to File

A. Arthur J. Porth
Wichita, Kansas
48-43-018-1-1
48-52-015-2-1

Arthur J. Porth maintained a long history of opposition to the IRS. On several occasions he made statements to the effect that he would not pay income tax, and that the authorities were reluctant to prosecute him.

In 1958 an examination was made of returns filed by Porth and his wife for 1953 through 1956. The Porths agreed to additional income tax of $2,514 for the period. A Form 870 was signed by them, but Porth refused to pay the assessment on the grounds that the income tax was unconstitutional. However, through forced collection action, the liability was subsequently satisfied.

For 1961, 1962, and 1963, Porth each year filed a Form 1040 showing only his name, address, and several Constitutional provisions that allegedly prevented him from completing the return.

Shortly before filing his document for 1963, Porth wrote a letter to the IRS that he would not serve as an agent for IRS in collecting Social Security and income taxes withheld from any of his employees, and that he would not in the future file a Form 941.

On June 28, 1967, Porth came to trial on the government's five-count indictment.

Counts one and two were for the willful failure to truthfully account for and pay over the FICA and Federal income taxes withheld from wages due and owing to the U. S. for the first and third quarters, respectively, of 1963, in violation of IRC 7202.

Count three was for the willful and knowing failure to make an income tax return for 1963, in violation of IRC 7203.

Attachment 1—Cont. (2) to MS 950-50

Counts four and five were for the willful and knowing failure to file an employer's quarterly Federal tax return for the first and third quarters of 1963, in violation of IRC 7203.

On June 10, 1967, the jury returned a verdict of guilty on all five counts. On July 19, 1967, Porth was sentenced to the custody of the Attorney General for five years on each of the first two counts and one year on each of the last three counts, the sentences to run concurrently.

B. Jerome Daly
Bloomington, Minnesota
41-93-080-1-1

Jerome Daly, a disbarred attorney, became very closely associated with the activities of Arthur J. Porth (see above case). Using the same constitutional arguments as Porth, Daly first filed a blank Form 1040 for 1965. The Audit Division issued him a summons for the production of books and records for the purpose of examining the return for that year. An appeal was made from the Court's initial order to comply with the summons, and from this appeal, the case was remanded. On rehearing the Judge refused to order Daly to comply with the summons on the grounds that the act of Daly filing a blank 1965 income tax return constituted a willful failure to file and that any information going to the income or expense of Daly would tend to incriminate him.

Daly continued filing Forms 1040 in blank for 1966, 1967, and 1968. As a result of this action, an investigation was initiated in January 1969. During the course of the investigation, Daly filed another blank Form 1040 for 1969.

Proof of Daly's income was established through specific items. A filing requirement was established for 1967, 1968, and 1969; however, taxable income was shown only for 1968. On June 27, 1972, Daly was indicted by a Federal Grand Jury on two counts of failure to file returns under IRC 7203. The counts were based on the years 1967 and 1968.

On October 12, 1972, Daly was found guilty, by jury trial, on both counts. On December 18, 1972, Daly was committed to the custody of the Attorney General under the provisions of 18 USC 4208(b) for a study of his mental condition as provided for in Section 4208(c). It was recommended that he be committed to, and that the study be conducted at, Sandstone (Minnesota) Federal Prison. Execution of sentence was stayed pending appeal.

C. Marvin L. Cooley
Mesa, Arizona
86-22-029-1-1
86720029 R

Marvin L. Cooley, following in the footsteps of both Porth and Daly, filed blank Forms 1040 for 1968, 1969, and 1970. During this period of time Cooley authored a book entitled, "The Big Bluff," in which he explained how to file returns without paying any tax. He also participated in several seminars conducted in various Western states, lecturing on the methods employed in avoiding the payment of taxes.

Attachment 1—Cont. (3) to MS 950-50

Cooley was charged under IRC 7203 with three counts of failing to file income tax returns for 1968, 1969, and 1970. Sufficient income to establish a filing requirement was shown for all years, but taxable income was shown only for 1970.

On April 30, 1973, Cooley was found guilty, by jury trial, on all three counts. Sentencing of Cooley has been delayed pending disposition of a motion for a new trial.

B. Prosecution of others filing "Porth-Daly" type documents have been undertaken generally under IRC 7203.

Tactics employed by those choosing this method of protest have been to deal in cash to the greatest extent possible; the obtaining of court orders to restrain banks from releasing any information to the government; and the obtaining of court orders to restrain the IRS from continuing its investigation, based upon the violation of the taxpayer's Constitutional rights.

Interference and Forcible Rescue

A. John Robert Heck, Jr. et al. (Nine others)
San Diego, California
95-24-330-3-1

Property belonging to John Heck was seized by the IRS for non-payment of taxes over a two-year period. On May 9, 1972, after a threat was made to the IRS that the property would be rescued if not released by noon of that day, agents were sent to protect the property under seizure. Initially a demonstration in front of the property was peaceful. But it became violent as soon as Heck broke a window and entered the premises. Certain of the principals entered the premises and others were involved in the assault on officers outside of the business.

All of the principals were charged with one or more of the following counts:

(1) Conspiracy to attempt the forcible rescue of seized property under 18 USC 371, IRC 7212(b).

(2) Attempt to forcibly rescue seized property under IRC 7212(b).

(3) Conspiracy to assault, resist and/or interfere with Federal officers under 18 USC 371, 111.

(4) Assault, resist and/or interfere with Federal officers under 18 USC 111.

On December 22, 1972, a verdict of guilty on one or more of the counts against all defendants was returned by the jury. Sentencing took place on March 5, 1973. One of the defendants was granted a new trial at this time, while all others received fines and probation. Fines imposed ranged from $50 to $1,000, while the period of probation ranged from six months to three years.

time or -- well, in that event, if we are to be precluded from that, we would ask to make an offer and tender of proof along such a line in the absence of the jury.

THE COURT: That is why I was giving this opportunity now.

MR. TATUM: All right. May we proceed along that line?

THE COURT: Sure.

MR. TATUM: Now, Doctor --

THE COURT: I would -- just instead of further interrogating the witness, if you would simply make for the record a showing of what you expect him in substance that testimony to be will suffice as an offer.

MR. TATUM: Comes now defendant, Willoughby E. Lacy, III, by and through his attorney, Jim Tatum, of record, and would make the following offer and tender of proof, and would object to the Court's ruling in precluding such offer and tender before the jury for the following reasons, and for each of them. We know that if the doctor were to be permitted to testify before the jury, he would testify that his objections to filing the 1040 form required are based upon certain constitutional issues which the doctor

holds very dear to him, among those being the First, Fourth, Fifth and Ninth Amendments of the United States Constitution, certain areas in the Bill of Rights in regard to taxation. And if the doctor were to be permitted to testify in front of the jury, he would testify that he objects very strongly to the use of United States taxpayers' dollars for the support of corrupt foreign governments, illegal wars, expenditures resulting in the death and maiming of thousands of foreign citizens, the payment to countries of military aid and civilian aid; those countries contributing to the corruption and crime in the United States by being large-scale and wholesale suppliers of heroin being delivered to our children, to our population. The doctor would further object to the use of the taxpayers' dollars to fund programs in foreign countries whose ultimate goal is the dissolution and destruction of these United States. And he further objects to the use of the taxpayers' dollars in supporting what he considers an over-large and somewhat needless bureaucracy which fees upon gainfully employed and productive taxpayers of the United States.

Respectfully submitted.

Now may I confer with my client?

THE COURT: Sure.

(Pause.)

MR. TATUM: Your Honor, may we further expand upon that motion and offer a tender of proof and offer to the Court that in the trial of this case, that we would tender numerous other witnesses to testify to the doctor's motive, intent at the time of the filing of the 1969 and '70 and '71 returns, and would show to the Court that testimony from these witnesses would be to the effect that the doctor's protest or motive in filing the returns as filed was his attempt to petition his government for redress of grievances and was the exercise of his First Amendment right of free speech. And that all we anticipate, we know that we would put several witnesses on, at least five to ten, who would testify, if they were allowed to testify, that --

THE COURT: Would you go ahead and name for the record the witnesses, please?

MR. TATUM: Your Honor, I don't have the list before me.

THE COURT: I think it would be necessary in order to have such -- make such a showing, that the witnesses be named.

MR. TATUM: All right. May I go ahead and finish this, and then we will read the list then.

"It was compulsory, you were forced to not file."

you the legal requirement to file a return and what it takes to be a return. The question may be raised as to, well, what if a person failed to file a tax return, though required to do so, but he was doing so as a political protest or because he thought the income taxes were unconstitutional or for some other sincere reason, would that constitute an excuse? No. If the failure to file is deliberate, knowing, intentional and conscious and voluntary, then the mere fact that it may have been prompted by a sincere belief that the law is bad or that the law is unconstitutional or for some other reason will not be an excuse to excuse and do away with the act which the law prohibits and which the law makes a crime.

In the question of whether some failure to act is willful, you may look to the entirety of the circumstances. Sometimes it is difficult to prove or establish what a person's state of mind is. In this context, you will recall that there was allowed into evidence for a limited purpose only some prior years of tax returns by the defendant. This you could consider, if you decide that he was required to file a return, but didn't, and then deciding about whether that was a willful failure. You could consider evidence of prior filing of proper returns as indicating

CC:ATL-CT
JMorton

Regional Commissioner, Internal Revenue Service,
Southeast Region, Attn: ARC, Intelligence

Regional Counsel - Southeast Region AUG 8 1974

Identity Group
Mobile, Alabama

Reference is made to subject July 30, 1974 memorandum which was informally presented to this office for an opinion concerning the feasibility of initiating a package investigation concerning the individuals in subject group. Further reference is made to informal discussions by Jack Morton of this office with your office.

Naturally, the decision whether to investigate or not is entirely that of the District Director; however, it certainly appears that this matter deserves looking into. The Alabama District, as you know, has had good success in regard to its package efforts, for example, that against the chiropractors concerning a (Porth) type situation.

Basically, each case in the package will naturally have to be legally probative and meet the standard of prosecution of this office; based on prior package experience and Chief Counsel guidelines, a package generally consists of anywhere from five to ten cases; it is also best, however, not specifically required, that all cases in the package be from the same judicial district so that the compliance problem can be emphasized through D.J. to the U. S. Attorney, and the trial judge himself.

This office is available for direct and indirect assistance in connection with further efforts in this project.

/s/ Henry C. Stockell, Jr.
Henry C. Stockell, Jr.
Regional Counsel

cc: District Director, Birmingham, Ala.
Attn: Chief, Intelligence Division

bag

INTERNAL REVENUE
RECEIVED
AUG 1 1974
CHIEF, INTELLIGENCE DIVISION
BIRMINGHAM

TO WHOM IT MAY CONCERN.

IN RECENT MONTHS OFFICIAL REVENUERS FROM THE INTERNAL REVENUE OFFICE HAVE BEEN ATTEMPTING TO OBTAIN INFORMATION FROM ME CONCERNING MY PAST AND PRESENT FINANCIAL STATUS.

Please take notice that I am not necessarily averse to communication with these people, but you must stand here advised that BEFORE I ACT AS A WITNESS AGAINST MYSELF OR OTHERS I will require from the Internal Revenue Agents or Officials a statement IN WRITING promising me a grant of immunity from prosecution, penalty or punishment OF ANY KIND or FORM.

THIS IS AFTER ALL ONLY THAT WHICH EVERY RUN-OF-THE-MILL PUNK AND HOODLUM KNOWS HE CAN DEMAND AND GET FOR HIS PART IN PROVIDING THE FEDERALISTS THE INFORMATION THEY NEED TO PROCEED.

SHOULD A LAW-ABIDING, GOD FEARING CITIZEN EXPECT ANY LESS?

DATE: SIGNED: _____

WITNESS: _____

Supreme Court, U. S.
FILED
JUL 21 1976
MICHAEL RODAK, JR., CLERK

No. 75-1606

In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLOUGHBY E. LACY, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

SCOTT P. CRAMPTON,
Assistant Attorney General,

ROBERT E. LINDSAY,
RICHARD B. BUHRMAN,
Attorneys,
Department of Justice,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 1) is not published (see 526 F. 2d 814).

JURISDICTION

The judgment of the court of appeals (Pet. App. 1) was entered on January 20, 1976, and a petition for rehearing was denied on April 5, 1976 (Pet. App. 4). The petition for a writ of certiorari was filed on May 4, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals erred in denying petitioner's motion to strike his brief and to "strike" his counsel of record, which petitioner filed after the court had affirmed his conviction.

2. Whether petitioner received the effective assistance of counsel at trial.

3. Whether petitioner's prosecution for failure to file income tax returns violated his Fifth Amendment privilege against compulsory self-incrimination.

4. Whether the trial court improperly denied petitioner the opportunity to prove that he was the subject of a discriminatory prosecution.

5. Whether the trial court properly instructed the jury on the element of willfulness.

STATUTE INVOLVED

Section 7203 of the Internal Revenue Code of 1954, as amended, 26 U.S.C. 7203, provides:

> Any person required under this title to * * * make a return * * * who willfully fails to * * * make such return * * * at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the cost of prosecution.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Alabama, petitioner was convicted of willfully failing to file income tax returns for the years 1969, 1970, and 1971, in violation of 26 U.S.C. 7203. The trial court sentenced petitioner to a term of nine months' imprisonment and fined him $5,000 on one count, and suspended sentence and imposed a two-year period of probation with respect to the remaining two counts (Pet. App. 2; Tr. 400-401).[1]

[1] "Tr." refers to the trial transcript.

During the years at issue, petitioner was a dentist (Tr. 339) and realized gross income of $43,332.13 in 1969, $41,933.86 in 1970, and $47,856.84 in 1971 (Tr. 279-283). For 1969 and 1970 petitioner filed blank income tax forms 1040 showing no income or expenses, but to which were attached various documents attacking the tax laws and claiming his First Amendment right to petition the government for redress of grievances (Tr. 14-15, 26, 100, 320; Govt. Exs. 3 and 4). Petitioner filed no form for 1971 (Tr. 16). During the investigation, petitioner told the agents that filing tax returns would violate his Fifth Amendment rights and his oath to defend the Constitution against domestic and foreign enemies (Tr. 95-98). Petitioner refused to turn over his records unless he received assurances of immunity from prosecution. When no such assurances were forthcoming, petitioner did not provide access to his records (Tr. 110-111).

During the trial, the court rejected (Tr. 270, 296-297, 328-330) all attempts to establish the "motivation on the part of [petitioner] in doing what he did" (Tr. 326). Petitioner's offer with regard to motivation invoked "certain constitutional issues * * * among those being the First, Fourth, Fifth, and Ninth Amendments to the Constitution". Petitioner's counsel stated that, if permitted, petitioner would seek to show that his "motive in filing the returns as filed was his attempt to petition the government for redress of grievances" (Tr. 330), to protest the use of government money for the "support of corrupt foreign governments, illegal wars, expenditures resulting in the death and maiming of thousands of foreign citizens" (Tr. 328-329) and "the use of the taxpayers' dollars in supporting what he considers to be an overlarge and somewhat needless bureaucracy" (Tr. 329). At the conclusion of the trial, the court instructed the jury on the element of willfulness as follows (Tr. 375-376):

Willful in this context means that such a failure to file must have been deliberate, intentional and voluntary and not the result of some accident or innocent mistake or mere negligence. The law in this respect says that before someone can be guilty of a criminal offense for failing to file a timely tax return in the manner required, it must have been a willful failure, saving anything short of that for something other than criminal prosecution, only that which involves allegations of willful failure. And it is up to the government in this case to prove this willfulness as I have described it beyond any reasonable doubt. Willfulness in this sense involves an intentional disregard or disobedience of some legal requirement. * * * The question may be raised as to, well, what if a person failed to file a tax return, though required to do so, but he was doing so as a political protest or because he thought the income taxes were unconstitutional or for some other sincere reason, would that constitute an excuse? No. If the failure to file is deliberate, knowing, intentional and conscious and voluntary, then the mere fact that it may have been prompted by a sincere belief that the law is bad or that the law is unconstitutional or for some other reason will not be an excuse to excuse and do away with the act which the law prohibits and which the law makes a crime.

After some deliberations the jury asked the court, *inter alia*, for a further discussion of the element of willfulness (Tr. 387), and the court gave the following supplemental instruction (Tr. 389):

> The term willful as used in this statute means a voluntary, purposeful, deliberate and intentional failure to file the return as distinguished from, for example, an accidental failure, inadvertent failure, or even a negligent failure for some reason to file a return. A failure to act is willful if it is voluntary and purposeful with the specific intent to fail to do that which the law requires. That is to say with the purpose to disobey or disregard the law. If that be so, and is done purposefully and deliberately and intentionally, then it would be done willfully. The mere fact, if it be a fact, that someone does not like a law or thinks that some law is unconstitutional, does not make his failure to comply with its requirements something less than willful. Notwithstanding whether it is a good intent or bad intent, if it is a knowing disregard of a requirement of law and is done deliberately and intentionally, then it is a willful action or in this case in the context of this case a willful failure.

DISCUSSION

1. Petitioner argues (Pet. 11-22) that the court of appeals erred in denying his motion to strike his brief and to "strike" his counsel of record. But petitioner did not file such a motion until six days after his conviction was affirmed (see Pet. App. 1; Pet. 14, 31). Thus, in denying petitioner's motion, the court of appeals ordered that the record show "that appellant discharged his said retained counsel after the decision of his case on the merits" (Order of March 22, 1976). Until the filing of his motion, petitioner had not previously complained about the effectiveness of his counsel. The court of appeals therefore correctly denied his attempt to discharge his counsel after the affirmance of his conviction had been announced in order to obtain a second appellate review.

2. Petitioner also argues (Pet. 11-22, 30-31) that he did not receive effective assistance of counsel at trial. However, as in the case of his claim of ineffective

appellate counsel, he did not raise this point in the court of appeals until after the affirmance of his conviction. In the absence of an evaluation of this contention by the courts below, there is no present basis for review by this Court. As far as the record indicates, petitioner was ably represented by retained counsel of his choice. Indeed, if petitioner wishes to pursue the point, he can seek relief under 28 U.S.C. 2255. See, *e.g.*, *United States* v. *Brown*, 476 F. 2d 933, 935 (C.A. D.C.); *United States* v. *Haywood*, 464 F. 2d 756, 763 (C.A. D.C.); *Powers* v. *United States*, 446 F. 2d 22, 24 (C.A. 5).

3. Petitioner further argues (Pet. 22-29) that his prosecution for failure to file income tax returns violated his Fifth Amendment privilege against compulsory self-incrimination. But in *United States* v. *Sullivan*, 274 U.S. 259, the Court held that the privilege against compulsory self-incrimination is not a defense to prosecution for failing to file a return at all. In so holding, the Court observed that "[i]f the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all" (274 U.S. at 263).

Sullivan therefore disposes of petitioner's Fifth Amendment claim. Although petitioner (Pet. 22-24) relies upon *Garner* v. *United States*, No. 74-100, decided March 23, 1976, that case does not support the proposition that prosecutions for failure to file tax returns may be barred by the Fifth Amendment. Indeed, in holding in *Garner* that tax returns in which the defendant had revealed himself to be a gambler were admissible in evidence in a prosecution for a gambling conspiracy, the Court reaffirmed "the continuing validity of *Sullivan*'s holding that returns must be filed" (slip op. 3, n. 3). Thus, while petitioner might have elected to

refuse to answer certain questions on the return, he could not lawfully refuse to file no return at all. See *United States* v. *Daly*, 481 F. 2d 28, 29 (C.A. 8), certiorari denied, 414 U.S. 1064; *United States* v. *Porth*, 426 F. 2d 519, 523 (C.A. 10), certiorari denied, 400 U.S. 824.

4. Petitioner further argues (Pet. 42-52) that the trial court denied him the opportunity to show that he was the subject of discriminatory prosecution. However, petitioner did not advance such a claim prior to trial and it was therefore waived in the absence of a showing of good cause. See Rule 12(b)(1) and (f), Fed. R. Crim. P. Petitioner now suggests (Pet. 48-51) that he was rushed to trial and prevented from fully acquainting his attorney with the nature of his discriminatory prosecution claim. But he had ample time within which to bring the matter to the attention of his attorney; the indictment preceded the commencement of the trial by approximately 48 days. Moreover, the trial court did not err in foreclosing petitioner from exploring before the jury the reasons underlying the institution of his prosecution (see Tr. 271-272, 289). A claim of discriminatory prosecution that does not relate to the question of guilt or innocence is for resolution by the judge, not the jury. *United States* v. *Berrigan*, 482 F. 2d 171, 174-176 (C.A. 3).

5. Finally, petitioner argues (Pet. 3-4, 32-42) that the trial court erred: (1) in excluding evidence of his alleged motives for failing to file tax returns, and (2) in failing to instruct the jury that the element of "willfulness" requires the jury to find that the charged offense was committed in bad faith or was the result of an evil motive. Petitioner urges that the trial court's instructions with respect to willfulness and its exclusion of evidence of his motives conflicts with *United States* v. *Bishop*, 412 U.S. 346, and *United States* v. *Murdock*, 290 U.S. 389.

The trial court's instructions (see pp. 4-5, *supra*) on the element of "willfulness" are in accord with *Bishop* and *Murdock*. The Court held in *Bishop* that the element of willfulness is the same in all federal tax offenses, whether felonies or misdemeanors, observing that the "longstanding interpretation" of the "word 'willfully' in these [criminal tax] statutes generally connotes a voluntary, intentional violation of a known legal duty" (412 U.S. at 360). In speaking of a single "longstanding interpretation," the Court made clear that the phrase "bad faith or evil intent" as used in *Murdock* (290 U.S. at 398) referred to nothing more than the bad purpose or evil motive that necessarily inheres in a voluntary, intentional violation of a known legal duty. The "bad faith or evil intent" formulation in *Murdock* did not concern the defendant's motive (*i.e.*, his reasons for acting); it was addressed to his intent or state of mind at the time of the proscribed act (*i.e.*, whether he intentionally and knowingly violated the law). Thus, proof of intentional wrongdoing is all that is required. *United States* v. *Hawk*, 497 F. 2d 365, 368 (C.A. 9), certiorari denied, 419 U.S. 838; *United States* v. *McCorkle*, 511 F. 2d 482, 485 (C.A. 7) (*en banc*), 423 U.S. 826; *United States* v. *Pohlman*, 522 F. 2d 974 (C.A. 8) (*en banc*), certiorari denied January 12, 1976, No. 75-483.[2]

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[2] *Murdock* involved a prosecution for willful failure to supply information requested by the Internal Revenue Service. The Court held that the criminal sanction for such conduct did not apply to one whose refusal to give the requested information has been based upon a bona fide, though mistaken, belief that his refusal was justified by his constitutional protection against self-incrimination. Since the scope of that privilege had been uncertain at the time of the defendant's refusal to supply the information, the Court held that he was entitled to an instruction that the jury should consider whether his conduct was based upon his good faith belief that the privilege was applicable. Thus, if the defendant had such a belief that he was constitutionally protected from complying with the summons, *i.e.*, that if in refusing to comply he was not violating a legal duty, his refusal was not willful. Moreover, unlike here, where petitioner could have tested his views by means of a refund suit, there was no way for the defendant in *Murdock* to test his belief that he did not have to comply with the summons other than refusing to obey it in the first instance. See *Maness* v. *Meyers*, 419 U.S. 449, 460-463.

Petitioner did not contend at trial that his failure to file returns had been based upon a good faith belief at the time of the offense that the Fifth Amendment privilege against compulsory self-incrimination permitted him to file no returns at all, or that he was unaware of his duty to file returns. To the contrary, his offer of proof (Tr. 328-329) consisted of his proposed testimony objecting to the various uses to which the revenues are put, his testimony that the incomplete return he filed was for the purpose of petitioning the government for redress of alleged grievances (Tr. 338), and an unspecific suggestion that petitioner sought to raise issues under the First, Fourth, Fifth and Ninth Amendments. The latter scattershot allegation, which appeared to relate to petitioner's purported effort to petition for grievances, was insufficient to constitute a bona fide claim of nonwillfulness, *i.e.*, that he believed in good faith that he was not obligated to file a return.

Thus, however sincere petitioner's beliefs that the income tax laws are unconstitutional or that federal tax monies are being misspent, the trial court correctly instructed the jury that petitioner's asserted beliefs could not negate the element of willfulness if he voluntarily and intentionally violated a known legal duty prescribed by the tax statutes. If "good motive" were a defense to a criminal tax prosecution, a person such as petitioner, who voluntarily and knowingly committed a criminal tax offense,

might nevertheless avoid conviction by asserting that he acted in order to protest an illegal and immoral war (see *United States* v. *Malinowski*, 472 F. 2d 850, 855 (C.A. 3), certiorari denied, 411 U.S. 970); to protest the withholding of income tax from the wages of workmen (*United States* v. *Smith*, 487 F. 2d 329, 330 (C.A. 9), certiorari denied, 416 U.S. 989); to avoid disclosure of his identity to others (see *United States* v. *Matosky*, 421 F. 2d 410, 411 (C.A. 7) certiorari denied, 398 U.S. 904); or to protest a particular government expenditure.

The trial court's instructions therefore correctly distinguished between intent, which is at the heart of the concept of willfulness, and motive, which is irrelevant to the traditional criminal standard of willfulness. However, in *United States* v. *Pomponio*, 528 F. 2d 247, the Fourth Circuit reversed a conviction for willful filing of a false income tax return on the ground that the trial court's instruction to the jury, *i.e.*, that good motive alone is never a defense where the act done or omitted was a crime, was contrary to *Bishop* and *Murdock*. That court concluded (528 F. 2d 249) that *Bishop* "* * * requires a finding of bad purpose or evil motive" and that "excluding good motive from the consideration of the jury in a [criminal tax case] is inconsistent with *Bishop*."

Since the trial court's instructions in this case were similar to those disapproved in *Pomponio*, there is an apparent conflict between the decision below and *Pomponio*, in which we have filed a petition for a writ of certiorari (No. 75-1667). We therefore do not oppose certiorari with respect to the questions in the petition relating to the trial court's instructions as to "willfulness" and its exclusion of evidence of petitioner's motivation in failing to file tax returns (Pet. 3-4, Questions 3 and 5). However, the Court may deem it appropriate to hold this case pending its ultimate disposition of *Pomponio*.

CONCLUSION

For the reasons stated this case should be held pending the disposition of *United States* v. *Pomponio* (No. 75-1667).

Respectfully submitted.

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Attorneys.

JULY 1976.